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9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 **IN THE MATTER OF WHETHER THE**
11 **DRAFT CEASE AND DESIST ORDER**
12 **CONCERNING CALIFORNIA AMERICAN**
13 **WATER'S DIVERSION FROM THE CARMEL**
14 **RIVER SHOULD BE ISSUED**

BRIEF RE: SCOPE OF HEARING ON
BEHALF OF CITY OF SEASIDE, CITY
OF CARMEL, CITY OF DEL REY
OAKS, MONTEREY HOSPITALITY
ASSOCIATION, AND SEASIDE BASIN
WATERMASTER

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16 This brief is submitted on behalf of the City of Seaside ("Seaside") and the Seaside Basin
17 Watermaster ("Watermaster"), which are represented by this office, and is also submitted on behalf
18 of the City of Carmel ("Carmel"), the City of Del Rey Oaks ("Del Rey Oaks") and the Monterey
19 Hospitality Association ("MHA"), whose counsel have reviewed this brief and have requested that
20 this office submit this brief collectively on behalf all five entities. Del Rey Oaks intends to request
21 permission to submit a late notice of intent to appear as a party at the hearing. If permission is not
22 granted for Del Rey Oaks to appear as a party, the remaining four entities request that this brief be
23 accepted on behalf of the remaining four entities exclusively.
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1 **I. BACKGROUND AND INTRODUCTION**

2 On January 15, 2008, the State Water Resources Control Board's ("SWRCB") Division of
3 Water Rights issued a draft Cease and Desist Order ("CDO") requiring California American Water
4 ("Cal AM") to cease and desist from diverting water from the Carmel River in excess of its legal
5 rights as determined in SWRCB WR Order 95-10. The draft CDO, if implemented as drafted,
6 would require Cal Am to reduce its unauthorized diversions from the Carmel River over a seven
7 year schedule, including a 15 percent reduction for the 2008-2009 water year and a 50 percent
8 reduction, or 5,642 acre-feet per year, by 2014.

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10 On February 4, 2008, Cal Am requested a hearing on the draft CDO. The SWRCB then
11 established a schedule for (a) filing notices of intent to appear as a full party, (b) a pre-hearing
12 procedural conference held on March 19, 2008, (c) an opportunity for public policy statements with
13 respect to the draft CDO to be held on April 1, 2008, and (d) a two-day hearing that was previously
14 scheduled for June 19 and 20, 2008.

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16 Seaside, Watermaster Carmel, and MHA were each represented by counsel at the pre-
17 hearing procedural conference held on March 19, 2008. At the pre-conference hearing, the
18 California Sport Fishing Alliance and the Sierra Club, Ventana Chapter, argued that the hearing
19 should be expanded to reopen SWRCB WR-Order 95-10. In response, the SWRCB hearing officer
20 ordered the parties to submit briefs concerning the appropriate scope of the forthcoming hearing.
21 The hearing officer also postponed the hearing to a future date after June 20, 2008. This brief is
22 submitted by Seaside and Watermaster with respect to the scope of the hearing.
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1 **II. THE HEARING SHOULD BE LIMITED TO THE NOTICED MATTER OF**
2 **WHETHER THE DRAFT CDO SHOULD BE ISSUED, BUT SHOULD BE**
3 **BIFURCATED INTO LIABILITY AND REMEDY PHASES**

4 **A. Hearing Scope**

5 The hearing should be limited to the noticed question of whether the draft CDO should be
6 issued as drafted. This is the only issue that was noticed, and it is the only matter that is appropriate
7 for the SWRCB to address at this time. The unfortunate facts are that Cal Am is currently confined
8 to two primary sources of water for the Monterey Peninsula: the Carmel River and the Seaside
9 Groundwater Basin. Cal Am's ability to extract groundwater from the Seaside Basin is constrained
10 by the Seaside Groundwater Basin Adjudication, which will be the subject of testimony at the
11 hearing. Thus, until a new source of water becomes available, Cal Am must continue to rely on
12 unauthorized diversions from the Carmel River to satisfy the water demands of the Monterey
13 Peninsula.

14 All parties would surely prefer that Cal Am, in conjunction with the California Public
15 Utilities Commission, had long ago perfected a new water supply project that would allow it to
16 serve the water needs of the Monterey Peninsula without reliance upon unauthorized diversions
17 from the Carmel River. However, for various reasons that will be addressed at the hearing, a new
18 water project has yet to be completed. However, several projects are currently being planned.
19 Depending upon the provision of the CDO, if one is issued, the SWRCB can positively influence
20 the effort to secure new water supplies.

21 Given these circumstances, the issues appropriate for the SWRCB to address at this time are:
22 (a) whether Cal Am's failure to complete a new water supply project to date amounts to a violation
23 of the provisions of SWRCB Order 95-10, and if so, (b) what is the appropriate remedy to address
24 the violation, if one is found. In the remedy context, the SWRCB will consider all aspects of the
25 public interest, including the impacts of continued unauthorized diversion upon fish, wildlife, and
26 other public trust resources, as well as the economic, social, and community impacts of an
27 immediate reduction in annual diversions from the Carmel River by Cal Am.

1 Expanding the hearing would not further serve the public interest because all relevant public
2 interest considerations will already be evaluated in the context of the liability and remedy aspects of
3 the hearing on the draft CDO. However, expanding the hearing would likely cause unnecessary
4 complexity and harm to the public interest. Such complexity would distract attention by Cal Am
5 and the other Monterey Peninsula stakeholders away from the ongoing efforts to obtain a new water
6 supply that will allow Cal Am to permanently eliminate its unauthorized diversions from the
7 Carmel River. This hearing process would thus become a liability with regard to the development
8 of solutions for the Monterey Peninsula. An expansion of the hearing beyond the noticed issue
9 would also cause unnecessary expense to Cal Am, and thus its ratepayers, and the other
10 participating parties. If Cal Am is in violation of Order 95-10, then the only relevant question is
11 how best to remedy the situation. Expanding the scope and complexity of the hearing will do
12 nothing to aid in a resolution of this basic question.

13 **B. The Hearing Should be Bifurcated into a Liability Phase and a Remedy Phase**
14 **to Render the Hearing Process More Efficient**

15 The noticed issue of whether the draft CDO should be issued involves two sub-matters that
16 should be bifurcated into separate hearing phases: (a) a “liability” phase concerning whether the
17 actions or omissions of Cal Am have resulted in a violation of the provisions of SWRCB WR Order
18 95-10 such that issuance of a CDO is appropriate; and (b) if a violation is in fact found, a “remedy”
19 phase concerning the appropriate provisions for the CDO, including whether immediate reductions
20 of Cal Am’s diversions from the Carmel River are prudent and consistent with the public interest.
21 The matter of liability is an issue best addressed by the Division of Water Right’s prosecution team
22 and Cal Am. Indeed, many parties, including Seaside and the Watermaster, would likely not call
23 witnesses to provide testimony during this initial phase because the matter is particular to, and best
24 addressed by Cal Am and the Division of Water Rights. On the other hand, most parties will likely
25 desire to submit testimony with respect to the appropriate remedial provisions of any CDO to be
26 issued.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
) SS
COUNTY OF)
SANTA BARBARA)

I am employed by Brownstein Hyatt Farber Schreck n in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 East Carrillo Street, Santa Barbara, California 93101. On April 9, 2008, I served the within documents:

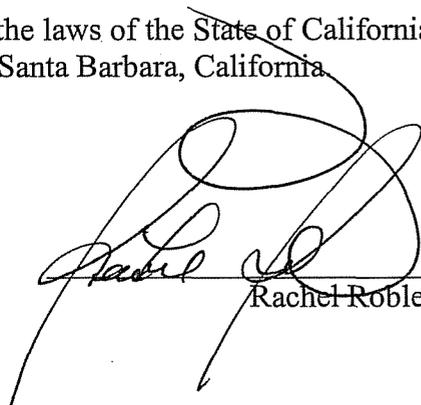
BRIEF RE: SCOPE OF HEARING ON BEHALF OF CITY OF SEASIDE, CITY OF CARMEL, MONTEREY HOSPITALITY ASSOCIATION, AND SEASIDE BASIN WATERMASTER

- By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Barbara, addressed as set forth below.
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- By sending a true copy of the above document to the parties as set forth on the service list at the fax numbers indicated. The facsimile machine used complied with CRC Rule 2003(3), and the transmission was reported as complete and without error. Pursuant to CRC Rule 2005(i), a transmission confirmation report was properly issued by the transmitting facsimile machine, stating the time and date of such transmission.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April; 9, 2008, at Santa Barbara, California



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